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ABSTRACT

This booklet presents a revision of the American Council on Education policy statement regarding sexual harassment in light of legal developments that have occurred since the original publication of the statement in December 1986. Among the changes in the statement is the inclusion of a non-exhaustive list of conduct which has great potential to be deemed sexually harassing. The booklet provides a brief review of the legal landscape upon which it was drafted. The policy statement itself is followed by discussions concerning the importance of developing a campus program on sexual harassment, the key components of an effective program, what the definitions of sexual harassment are, grievance procedures required, and the guidelines for program development on college campuses. The booklet concludes with a list of 16 resource persons who are willing to consult with others on the development of policies, procedures, or programs dealing with sexual harassment; and a list of selected resource materials (25 citations). (GLR)

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A Policy and Program of Deterrence
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SEXUAL HARASSMENT ON CAMPUS

A Policy and Program of Deterrence

American Council on Education

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Dear Colleague:

In April 1989, ACE republished a statement on sexual harassment in the workplace strongly recommending that all member institutions adopt sexual harassment policies. The recent publicity relating to instances of sexual harassment has again raised our concern about sexual harassment on campuses, as both places of work and study. It is therefore crucial for all institutions to develop the capacity to recognize conduct that violates an individual's dignity, the law, and that could give rise to legal liability.

The urgency of creating, reviewing, or revising campus sexual harassment policies, procedures, and educational programs is reinforced substantially by the recent United States Supreme Court decision in *Franklin* v. *Gwinnett County Public Schools*. The Court ruled that money damages are available to students and other victims of intentional gender discrimination (in this case, sexual harassment) under Title IX of the Education Amendments of 1972.

For all these reasons, ACE has revised its statement on sexual harassment in light of legal developments that have occurred since the original publication of the statement in December 1986. Among the changes in the statement is the inclusion of a non-exhaustive list of conduct which has great potential to be deemed sexually harassing. Although non-exhaustive, the list can serve as a useful educational tool to explain what the law and your institution consider to be inappropriate conduct. Other changes fine-tune the statement to comport with recent judicial decisions evaluating the effectiveness of employers' sexual harassment policies. ACE suggests that your institution's sexual harassment policy should be reviewed, or drafted if you do not already have such a policy, in light of the considerations contained in the attached statement on sexual harassment.

For a better understanding of the policy statement, a brief review of the legal landscape upon which it was drafted may be helpful. In 1980 the Equal Employment Opportunity Commission (EEOC) first issued its Sexual Harassment Guidelines defining sexual harassment as a violation of Title VII of the Civil Rights Act of 1964. In 1986, the Supreme Court issued its landmark decision in *Meritor Savings Bank* v. *Vinson,*[1] which recognized two categories of sexual harassment violative of Title VII: (1) "quid pro quo" harassment in which a supervisor conditions the receipt of job benefits upon an employee's submission to sexual advances; and (2) "hostile environment" harassment, which includes the creation of a hostile or offensive work environment based upon sex.

The root of the difficulty in defining the unwelcome, hostile, or offensive nature of an environment may lie in the fact that the perceptions of men and women may differ as to what constitutes harmless fun and what constitutes offensive conduct. Recognizing that men and women may view certain conduct differently, some courts have begun to adopt what is known as a "reasonable woman," rather than a "reasonable person," standard to determine whether conduct is unwelcome and sufficiently pervasive to amount to sexual harassment.[2] Under this standard, the proper focus is on the victim's perspective of the given conduct and thus, in the typical case, a sexual harassment claim is proven if a reasonable woman would consider the harassment hostile or offensive.

Although no exhaustive definition of sexual harassment is possible, developments since we initially drafted our statement on sexual harassment have offered insights as to what type of conduct will be deemed hostile or offensive. Examples include, but are in no way limited to, unwanted sexual advances; repeated sexually oriented kidding, teasing or jokes, flirtations, advances, or propositions; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess, or sexual deficiencies; leering, whistling, touching, pinching,

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1 477 U.S. 57 (1986)

2 See e.g., *Ellison* v. *Brady*, 924 F. 2d 872 (9th Cir. 1991).

or brushing against another's body; and the unwelcome display of objects or pictures which are sexual in nature that would create a hostile or offensive work environment.

Against this background, the extreme importance of implementing an effective sexual harassment policy and attendant educational program can be better understood. The EEOC has advised as follows:

Prevention is the best tool for the elimination of sexual harassment.

An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize and educate all concerned.[3]

Although the adoption of such a policy will not be a defense to a claim of "quid pro quo" harassment, the implementation and communication of the policy may serve as a deterrent to such abhorrent behavior. To that end, any sexual harassment policy should contain an unequivocal statement that sexual harassment is unacceptable behavior and a violation of the law and will not be tolerated or condoned by the institution. The policy should also present a clear statement of the disciplinary consequence of engaging in sexual harassment.

The Supreme Court's decision in *Vinson* and the EEOC Guidelines on Sexual Harassment make it clear that an employer can establish a defense to claims arising from a sexually hostile or offensive environment by establishing and following grievance procedures designed to encourage victims of harassment to come forward. The general test for employer liability in "hostile environment" cases remains whether the employer knew or should have known of the alleged sexual harassment and failed to take immediate and appropriate corrective action. Thus, on the one hand, if an employer knows of the existence of a hostile environment and takes no action to correct it, the

[3] 29 C.F.R. § 1604.11(f).

employer will be liable for that environment. On the other hand, where an employer maintains a "strong, widely disseminated, and consistently enforced employer policy against sexual harassment," backed by an "effective complaint procedure," the employer will prevent most sexual harassment and may avoid liability.

As we suggested in both 1986 and 1989, your policy against sexual harassment should be unequivocally and regularly communicated to all employees, faculty, and staff. Your strong disapproval of sexual harassment should be emphasized, and the disciplinary sanctions for harassment should be explained. Although the existence of a policy against sexual harassment does not completely insulate an employer, the Supreme Court noted in *Vinson* that it is "plainly relevant" in assessing liability. The existence of a clear policy should encourage potential victims to report incidents of perceived sexual harassment earlier than if no policy was in effect. If reported internally and stopped at an early stage, initial incidents may not be considered sufficiently severe or pervasive to constitute actionable sexual harassment.

The elements of an effective campus program on sexual harassment are contained in the attached statement. If your institution creates, communicates and vigorously enforces such a program, it will fulfill the dual goals of reducing incidents of sexual harassment on campus, as well as minimizing the institution's potential liability for sexual harassment if and when it occurs.

This issue warrants your institution's utmost concern, as the national debate on sexual harassment demonstrates. Our work in this area is being coordinated by Donna Shavlik, director of ACE's Office of Women in Higher Education, (202) 939-9390, and Shelley Steinbach, ACE's general counsel, (202) 939-9355. If you have any questions concerning the contents of this letter or the attached statement, please do not hesitate to contact one of them.

Sincerely,

Robert H. Atwell
President

SEXUAL HARASSMENT ON CAMPUS:

A POLICY AND PROGRAM OF DETERRENCE

Introduction

Despite the adoption and enforcement of sexual harassment policies at a number of institutions, many others still have not taken even these preliminary measures to address this issue. Furthermore, despite the adoption of policies, EEOC guidelines and policy statements on sexual harassment, numerous sexual harassment lawsuits, preventive educational programs, and publicity concerning sexual harassment, the problem continues to be major in its scope and traumatic in its impact on the students, faculty, and staff who experience sexual harassment.

Considerable research has been conducted on sexual harassment in higher education since the late 1970s. While we will not review the entire range of topics covered by this research, we will focus on its findings enough to document the alarming frequency with which sexual harassment occurs on our campuses. In general, the research indicates that about one-third of our female students who attend research universities experience sexual harassment while enrolled.[1] At moderately sized universities, research indicates that about one-fourth of the female students experience sexual harassment from a professor or supervisor.[2] Incidence research shows 3 to 12 percent of the male students being sexually harassed.[3] Between 20 and 49 percent of women faculty have experienced sexual harassment at work, and administrative women report more experiences of sexual harassment.[4]

In 1980, the Equal Employment Opportunity Commission issued guidelines defining sexual harassment as a violation of Title VII of the Civil Rights Act of 1964. In those guidelines the EEOC defined two basic types of sexual harassment: "quid pro quo" and "hostile

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1 Linda J. Rubin and Sherry B. Borgers, "Sexual Harassment in Universities during the 1980s," *Sex Roles*, Oct. 1990, 23, 7–8, 397–411.

2 Roscoe, Goodwin, Repp and Rose, "Sexual Harassment of University Students and Student-Employees: Findings and Implications," *College Student Journal*, Fall 1987, 21, 3, 254–273.

3 Ibid.

4 Fitzgerald, L.F., et.al., "The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace," *Journal of Vocational Behavior*, 1988, 32, 152-175.

environment." In June 1986, the United States Supreme Court in *Meritor Savings Bank, FSB* v. *Vinson*, in a unanimous decision, held that sexual harassment does violate Title VII and approved the basic terms of the EEOC's sexual harassment guidelines. In March 1990, the EEOC issued further policy guidance on sexual harassment.

"Quid pro quo" sexual harassment occurs when submission to or rejection of unwelcome sexual advances is used as the basis for employment decisions. "Hostile environment" sexual harassment occurs when unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates an intimidating, hostile, or offensive working environment, even in the absence of tangible or economic job consequences.

The Supreme Court's decision in *Vinson* as well as the EEOC's 1990 policy guidance emphasize the importance of having an effective sexual harassment policy and procedures for the resolution of sexual harassment claims. They can provide an employer with an effective defense in sexual harassment cases.

Although the *Vinson* decision and the EEOC's policy guidance applies specifically to employment, it is prudent to examine the issue of sexual harassment on college campuses beyond just the employment setting.

The Importance of Developing A Campus Program on Sexual Harassment

The educational mission of a college or university is to foster an open learning and working environment. The ethical obligation to provide an environment that is free from sexual harassment and from the fear that it may occur is implicit. The entire collegiate community suffers when sexual harassment is allowed to pervade the academic atmosphere through neglect, the lack of a policy prohibiting it, or the lack of educational programs designed to clarify appropriate professional behavior on campus and to promote understanding of what constitutes sexual harassment. Each institution has the obligation, for educational and moral, as well as legal reasons, to develop policies, procedures, and programs that protect students and employees from sexual harassment and to establish an environment in which such unacceptable behavior will not be tolerated.

Taking preventative steps can help address legitimate constituent concerns as well as shield the institution from potential liability.

Key Components of Effective Campus Programs

An effective campus program on sexual harassment has several key elements affecting both policy and procedure. These elements can also be found in successful business and government programs. The objectives of the policy should be to: (1) discourage acts considered to be sexual harassment; (2) encourage faculty, staff, and students to report incidents they consider to be sexual harassment at the earliest possible stage; (3) make clear that sanctions will be enforced when charges of harassment have been proven; and (4) provide protection for the institution against claims of unreported sexual harassment. To achieve these goals, the policy should: (1) familiarize all faculty, staff, and students with the definition of sexual harassment and the forms it can take; (2) clearly state that sexual harassment is prohibited and will be

punished; (3) instruct victims of the course of action they should take to report sexual harassment; and (4) clarify the rights of those accused of harassment. Among the key elements are:

1. **A basic definition:** What constitutes sexual harassment?
2. **A strong policy statement:** Stating that sexual harassment will not be tolerated and stating that violations of the policy will result in disciplinary action up to and including expulsion or termination.
3. **Effective communication:** Direct, comprehensive, written and oral communications informing students, faculty, staff, and administrators about the campus policy against sexual harassment.
4. **Education:** Educational programs designed to help all members of the community recognize and discourage sexual harassment.
5. **An accessible and effective grievance procedure:** Recognizing that many employees and students will be reluctant and/or embarrassed to complain about sexual harassment, the procedure should be calculated to encourage victims to come forward with a report or complaint. Various channels for reporting sexual harassment or making complaints should be provided.
6. **Effective investigation and resolution of sexual harassment complaints:** A detailed procedure providing for prompt investigation, insuring confidentiality for all parties to the extent possible, and applying appropriate remedies.

Definitions of Sexual Harassment

The task of developing a basic statement of what constitutes sexual harassment is an important part of the educative process for the campus. This paper does not attempt to give a model definition suitable to all

campuses, but instead presents some of the elements to consider in developing a basic statement.

Sexual harassment is a form of sex discrimination which is illegal under Title VII of the Civil Rights Act of 1964 for employees and under Title IX of the Education Admendments of 1972 for students. Many state laws and/or regulations also render it illegal.

Sexual harassment can be verbal, visual, or physical. It can be overt, as in the suggestion that a person could get a higher grade or a raise by submission to sexual advances. The suggestion or advance need not be direct or explicit—it can be implied from the conduct, circumstances, and relationship of the individuals involved. Sexual harassment can also consist of persistent, unwanted attempts to change a professional or educational relationship to a personal one. It can range from unwelcome sexual flirtations and inappropriate put-downs of individual persons or classes of people to serious physical abuses such as sexual assault and rape. Examples include, but are not limited to, unwelcome sexual advances; repeated sexually oriented kidding, teasing, joking, or flirting; verbal abuse of a sexual nature; graphic commentary about an individual's body, sexual prowess, or sexual deficiencies; derogatory or demeaning comments about women in general, whether sexual or not; leering, whistling, touching, pinching, or brushing against another's body; offensive crude language; or displaying objects or pictures which are sexual in nature that would create hostile or offensive work or living environments. Such conduct is coercive and threatening and creates an atmosphere that is not conducive to teaching, learning, and working.

For general policy purposes, sexual harassment may be described as unwelcome sexual advances, requests to engage in sexual conduct, and other physical and expressive behavior of a sexual nature where: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or education; (2) submission to or rejection of such conduct by an individual is used as the basis for academic or employment decisions affecting the individual; or (3) such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile, or demeaning employment or educational environment.

Grievance Procedures

If a general grievance procedure is not already in place, a complaint and reporting system should be created. It should allow students and employees to report harassment and assure them freedom from threats and reprisals. The design of the grievance procedure should include a provision that allows the complaining party to avoid her or his immediate supervisor, department head, or faculty advisor, who frequently, as in *Vinson*, may be the source of the problem. In some situations it may be impossible to determine whether the sexually harassing conduct did or did not occur. Many educated people and most malicious sexual harassers make sexual advances and/or comments with no witnesses present. Therefore, substantial sensitivity and confidentiality should be standard for each investigation.

Guidelines for Developing a Campus Program on Sexual Harassment

The following guidelines may be helpful in improving a current sexual harassment policy/program, or designing a new one:

1. A strong policy should be developed that prohibits sexual harassment and informs faculty, staff, and students that it is unlawful to retaliate in any way against anyone for articulating any concern about sexual harassment or discrimination against that person or another.
2. A formal policy should be in place that defines sexual harassment and includes a statement as to why it is important for the institution to prevent sexual harassment. This policy may be more effective if it is endorsed by the faculty governing body and monitored by a committee of that body.
3. Specific guidance discouraging romantic relationships between professors and students, professors and teacher

assistants, teacher assistants and undergraduates, and faculty and support staff should be considered.

4. A grievance procedure should be developed that encourages the reporting of incidents of sexual harassment, that allows first for informal resolution and then, if the process fails, for formal resolution. The procedure should establish several alternate individuals with whom the claim may be raised in order to enable the employee to circumvent the accused harasser and to encourage victims to come forward.

5. Any investigation should include interviews and requests for written statements from the complaining employee, the alleged harasser, and witnesses to the alleged harassing behavior or incident, or its consequences. In evaluating a grievance, an attempt should be made to focus on the perspective of a person situated similarly to the accuser. An investigator should attempt to maintain confidentiality, however, a complainant should be told that complete anonymity may give way to the institution's obligation to investigate and take appropriate action. Because it is important that every effort be made to keep the incident confidential, discretion should be exercised in determining which witnesses are indeed necessary to the investigation.

6. The policy should be disseminated to all faculty, staff, administrators, and students, as well as to those who contract to do business on campus, including those agencies, businesses, education groups, etc. that provide students with internships. The policy and supporting materials could be included in or with the student handbook; course catalog; employee handbook; administrative, faculty, and staff handbooks and pamphlets; employee time cards or paychecks; students' grade reports; institutional campus contracts; and could be incorporated into the academic governance code.

7. The results of resolved complaints should be published on a periodic basis, making certain that all information to be used

the privacy of parties involved, e.g., types of resolution by frequency.

8. A method must be developed for informing new staff, faculty, students, and administrators about the policy and for including them in all education programs. Orientation programs and other in-house workshops and seminars may serve as appropriate forums.

9. A current and timely campus-wide educational program should be designed to help all members of the campus community to understand, prevent, and combat sexual harassment. Brochures describing what kinds of behavior constitute sexual harassment and what the person who is being harassed should do about it have been used very successfully on a number of campuses.

10. Additional training should be provided for supervisory personnel, especially deans, department heads, and administrative and student affairs staff, through workshops and seminars. Student and collegiate governance structures may be appropriate outlets for ongoing training and discussion.

11. A coordinator should be appointed to handle reports of harassment. The ombudsperson, affirmative action officer, a student affairs staff member, or a combination of people in these positions, could serve in such capacity. This person or persons should be clearly identified and should be known to students, faculty, staff, and administrators and be highly respected by the entire campus community.

12. Penalties for violations of the policy should be adopted, publicized, and enforced.

13. Complaints should be investigated and resolved promptly.

14. Careful written records should be kept, but precautions should be taken to protect the privacy of all parties involved as much as possible.

15. Action should be taken to resolve complaints even if a discrimination charge has been filed with EEOC or a state EEO agency.

16. Peer harassment should be considered part of the policy on sexual harassment. Fostering educational programs for students and for every level of employees on this subject is critical to improving the campus climate with regard to sexual harassment. Many campuses have instituted successful programs in living groups, various institutional organizations, and administrative units to help people understand the changing nature of male–female relationships and the value of respecting others' feelings, rights, and responsibilities.

17. The policy should make clear that all persons affected by a particular incident will be treated with respect and given full opportunity to present their side of the incident. Both those who are harassed and those who create the problems must be afforded due process and as much confidentiality as possible during the process.

The steps presented in this document represent a springboard for addressing sexual harassment. Creating a healthy environment on campus for all community members requires much more—constant vigilance, strong and visible support of the campus leadership, continuous training of all persons who have responsibility for policy and educational programs, and periodic review of procedures. Handling the incidents of harassment with sensitivity to all parties while understanding the importance of fairly and expeditiously resolving the problem are critical components of sound policies and procedures.

The Council plans to provide additional documents and other resources—case studies, video tapes, strategies—on a continuing basis to help campuses develop and refine their programs. In the meantime, it is hoped that this document will enable campuses to begin programs or to enhance existing efforts.

RESOURCE PERSONS AND MATERIALS

Listed below are some campus personnel who have worked extensively on the issue of sexual harassment and are willing to consult with others on the development of policies, procedures, or programs dealing with sexual harassment. Also listed are a few major resource materials.

Selected Resource Persons

Sue A. Blanshan
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Selected Resource Materials

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